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HIGH COURT OF GUJARAT AT AHMEDABAD.

CRIMINAL APPEAL NO. 315 OF 1989.

DATE OF DECISION: 1.8.1996.

FOR APPROVAL AND SIGNATURE

THE HONOURABLE Mr.JUSTICE J.M.PANCHAL,

AND

THE HONOURABLE Mr.JUSTICE M.H.KADRI.

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1. Whether Reporters of Local Papers may be allowed to see the Judgment? NO.

2. To be referred to the Reporter or not ? NO.

3. Whether Their Lordships wish to see the fair copy of Judgment ? NO.

4. Whether this case involves a subst--antial question of law as to the interpretation of the Constitution of India, l950 or any order made thereunder ? NO.

5. Whether.......T....R

JJ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ the Civil Judges ? NO.

Mr.K.B.Anandjiwala, Advocate, for the appellants.

Mr.S.R.Divetia, APP, for the Respondent.

CORAM: J.M.PANCHAL & M.H.KADRI, JJ.
(August 1, 1996)

ORAL JUDGMENT (per PANCHAL J.)

In this appeal, which is filed under S.374 of the Code of Criminal Procedure, 1973, the appellants have assailed legality and validity of judgment and order dated March 27, 1989, rendered by the learned Sessions Judge, Rajkot, in Sessions Case No. 45 of 1988, convicting them under S.302 read with S.34 of the I.P.Code as well as S.135 of the Bombay Police Act, and sentencing them to R.I. for life. It may be mentioned that no separate sentence is imposed on the appellants under S.135 of the Bombay Police Act.

2. The prosecution case in brief is that deceased Dhanabhai was residing with his family members at Street No.9 situated at Ramnathpara, Rajkot, and was dealing in scrap. Manjulaben Bhagwanjibhai is the sister co-religionist of deceased Dhanabhai. The incident took place on March 7, 1988 at about 6.00 p.m. in Ramnathpara area of Rajkot, near the raised platform where grain for birds is laid. One Laxman Koli and his wife were selling eggs and fish at their residence. Deceased Dhanabhai in company of his uncle Mavjibhai Savabhai Rajput had gone to the house of Laxmanbhai for purchasing eggs. As it was late in the night, Laxmanbhai had refused to sell eggs. Thereupon quarrel had taken place between deceased Dhanabhai and Mavjibhai Savabhai Rajput on one hand and Laxmanbhai Koli on the other. On the date of incident, after taking pan, deceased Dhanabhai and his friend Abdul Aziz were standing near the raised platform where grain for birds is laid. At that time, the appellants who are friends of Laxmanbhai Koli, came near deceased Dhanabhai and started abusing him. Accused no.1 started the quarrel by saying that the deceased had quarrelled with Laxmanbhai and had therefore, become a bully. However, deceased Dhanabhai did not reply. Thereafter accused no.1 took out knife from the waistband of his pants, whereas accused no.2 was armed with dharia. Both the appellants attacked deceased Dhanabhai indiscriminately with their weapons. Manjulaben Bhagwanjibhai who was passing by the chabutra raised shouts to the effect that deceased Dhanabhai was being assaulted. At that time, Labhuben Koli and other persons also gathered near the place of incident. Deceased Dhanabhai sustained injuries on stomach, thigh, head, neck, hands, etc. and therefore, fell down on the ground and died on the spot. Manjulaben Bhagwanjibhai who is the sister co-religionist of deceased Dhanabhai,

therefore, covered the dead body of deceased Dhanabhai with her sari. As people started gathering near the place of incident, the appellants ran away and while running away, appellant no.2 dropped dharia near the house of Labhuben Koli. After covering the dead body of deceased Dhanabhai with her sari, Manjulaben was going to Street No.12 of Ramnathpara where Mavjibhai, who is the uncle of deceased Dhanabhai was residing, to inform him about the incident. Mavjibhai Savabhai Rajput was, at the relevant time, at his house. He heard certain children saying that Dhanabhai was beaten. Therefore, he started for going towards chabutra. On way he met Manjulaben Bhagwanjibhai who informed him that accused no.1 with knife and accused no.2 with dharia had attacked deceased Dhanabhai. Manjulaben also requested Mavjibhai to summon ambulance van and go near chabutra so that deceased Dhanabhai could be removed to hospital. Mavjibhai Savabhai went to a shop and telephoned for ambulance van. On arrival of ambulance van, the deceased who was lying in a pool of blood was taken to civil hospital, Rajkot. The doctor on duty in the OPD declared that deceased Dhanabhai had expired. Police Constable Mastram Odhavdas, who was on duty at the police chowky, Civil Hospital, Rajkot recorded the information given by Mavjibhai Savabhai and made necessary entry at Sr.No.6 in the register which was maintained at the hospital police chowky. Thereafter, the police constable sent intimation to Rajkot City 'B' Division Police Station. PSO Jatubha Pathubha, who was on duty at the Rajkot City 'B' Division Police Station registered the First Information Report. It was investigated into by Chimanlal Trikamlal Sonara, who was then discharging duty as Police Inspector, Rajkot City 'B' Division Police Station. The Investigating Officer went to the hospital and recorded the complaint of Mavjibhai Savabhai and sent it to the police station for registration. The Investigating Officer thereafter held inquest on the dead body of deceased Dhanabhai and sent it for autopsy. He also recorded the statements of three eye-witnesses during the night between 7.3.88 and 8.3.88. Meanwhile, the appellants surrendered before police between l2.30 a.m. and 1.30 a.m. on 8.3.88. The Investigating Officer, in the presence of panch witnesses prepared arrest panchnama and seized incriminating articles like blood stained clothes of the accused, etc. At about 2.15 a.m., accused no.1 showed his willingness to point out the place where he had concealed the knife used in commission of the offence. The Investigating Officer, therefore, prepared discovery panchnama, and knife was discovered at the instance of appellant no.1 in presence of panch witnesses. Panchnama regarding seizure of dharia was also prepared in due course. Blood stained articles which were seized,

were sent to Forensic Science Laboratory for analysis. The autopsy report prepared by Dr.Kishore Ratilal Raiyani indicated that deceased Dhanabhai died due to shock because of haemorrhage resulting from multiple injuries. On completion of investigation, the appellants were charge-sheeted under S.302 read with S.34 of I.P.code and S.135 of the Bombay Police Act. As the offence under S.302 of the I.P.Code is exclusively triable by Court of Sessions, the case was committed to Sessions Court for trial. The learned Sessions Judge framed charge against the appellants at Exh.3, under S.302 read with s.34 of the I.P.Code and S.135 of the Bombay Police Act. The charge was read over and explained to the accused. The accused pleaded not guilty to the charge and claimed to be tried.

3. The prosecution, therefore, examined the following witnesses, in order to prove its case against the appellants :

(i) Manjulaben Bhagwanjibhai PW 1 Ex. 10,
(ii) Labhuben Narshibhai PW 2 Ex. 11,
(iii) Kalyanbhai Becharbhai PW 3 Ex. 13,
(iv) Dr.Kishore Ratilal Raiyani PW 4 Ex. 14,
(v) Mavjibhai Savabhai Rajput PW 5 Ex. 16,
(vi) Abdul Aziz PW 6 Ex. 23,
(vii) Iqbal Valibhai PW 7 Ex. 24,
(viii) Kishorebhai Mohanbhai PW 8 Ex. 26,
(ix) Pravin Amarshi PW 9 Ex. 28,
(x) Prakash Jivanbhai PW 10 Ex. 30,
(xi) Mastram Odhavdas PW 11 Ex. 32,
(xii) Jasubha Pathubha PW 12 Ex. 34,
(xiii) Chimanlal Trikamlal Sonara PW 13 Ex. 38.

The prosecution also relied on documentary evidence such as the complaint, map of scene of offence, autopsy report, panchnama regarding seizure of clothes from the dead body of deceased Dhanabhai, report of Forensic Science Laboratory, inquest panchnama, panchnama of scene of offence, discovery panchnama regarding production of knife by accused no.1, etc. to prove its case against the appellants.

4. After the witnesses for the prosecution had been examined, the learned Sessions Judge questioned the appellants generally on the case and recorded their statements under S.313 of the Code of Criminal Procedure, 1973. In their statements which were recorded under S.313 of the Code, the appellants stated that the case of the prosecution against them was false. However, the appellants did not lead any evidence in their defence. The learned Counsel for the accused submitted written

arguments on their behalf at Ex.43. Original informant had also instructed Mr.S.N.Sonpal, learned Advocate to assist the ld.P.P. in charge of the case. Mr.S.N.Sonpal, the learned Counsel for the original informant submitted an applic.....T....R

submit written arguments on behalf of the original informant. That application was granted by the court and therefore, on behalf of original informant written arguments were submitted under S.301(2) of the Code of Criminal Procedure, at Ex. 46.

5. After taking into consideration the evidence led by the prosecution, and hearing the learned Counsel appearing for the parties, the learned Sessions Judge recorded the following conclusions :

(i) The evidence of Medical Officer Dr.Kishore Ratilal Raiyani read with post-mortem notes indicates that deceased Dhanabhai died a homicidal death.

(ii) From the evidence of eye-witnesses, viz. (1) Manjulaben Bhagwanjibhai, (2) Labhuben Narshibhai, (3) Kalyanbhai Bechharbhai, and (4) Abdul Aziz, it is evident that the appellants had assaulted deceased Dhanabhai by means of knife and dharia respectively, as a result of which the deceased died. The eye-witnesses' account inspires confidence of the court because they have no grudge or animosity against the appellants and therefore, they would not involve the appellants falsely in the case.

(iii) The evidence of eye-witnesses is amply corroborated by medical evidence.

(iv) The evidence of eye-witnesses also gets corroboration from the fact that the clothes of the appellants which were seized immediately after the incident were stained with blood having 'A' group, which was also the blood group of the deceased. The knife used by appellant no.1 in the incident which was discovered pursuant to information given by him had also blood having 'A' group.

(v) The dharia used by appellant no.2 in the incident which was dropped by him near the house of witness Labhuben, was also seized, and it had human blood-stains which corroborates the sworn testimony of the eye-witnesses.

(vi) The medical evidence establishes that the injuries

sustained by deceased Dhanabhai were possible by means of knife and dharia, which were produced by prosecution as muddamal articles no. 3 and 7.

(vii) The medical evidence proves it beyond reasonable doubt that the injuries sustained by the deceased were sufficient in the ordinary course of nature to cause death.

(viii) The evidence on record proves it beyond reasonable doubt that the common intention of the appellants was to kill the deceased, and to execute the common intention, appellant no.1 had armed himself with knife, whereas appellant no.2 had armed himself with dharia.

(ix) The appellants had in furtherannce of common intention, caused serious injuries to deceased Dhanabhai by means of knife and dharia which resulted into his death, and are therefore guilty under S.302 read with S.34 of the I.P.Code.

(x) Appellant no.l had knife with him whereas appellant no.2 had dharia with him on 7.3.1988, in contravention of the Notification issued by the Competent Authority under the provisions of the

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to 30.3.1988, and therefore, the appellants have committed offence punishable under S.135 of the Bombay Police Act, 1951.

6. In view of the above referred to conclusions, the learned Judge convicted the appellants under S. 302 read with S. 34 of the I.P.Code as well as S.135 of the Bombay Police Act, and imposed the sentence which is referred to earlier, giving rise to the present appeal.

7. Mr.K.B.Anandjiwala, ld. Counsel for the appellants has taken us through the entire evidence on record. After referring to the evidence of Head Constable Mastram Odhavdas, it was submitted that witness Mavjibhai Savabhai failed to disclose in his earliest version that he was informed by Manjulaben about assault on the deceased by the appellants and therefore, his testimony should be disbelieved. It was emphasised that before noting down the information given by witness Mavjibhai, he was interrogated by Head Constable Mastram Odhavdas, but Mavjibhai did not mention the fact that appellant no.2 had given blows with dharia to the deceased and therefore, his

evidence should be rejected as unreliable. It was contended that witness Mavjibhai has made material improvements in his deposition before the court and therefore, the same deserves to be discarded. With reference to the evidence of Manjulaben Bhagwanjibhai, it was urged that her evidence deserves to be disbelieved because, though in examination-in-chief she has stated that while going to the tea larri of her father at about 6.0 p.m., she witnessed the incident when she reached near chabutra, in cross-examination, she has admitted that the place of incident does not come on way to the tea larri of her father and therefore, her presence at the place of incident becomes doubtful. It was claimed that though she has stated in her evidence that she had covered the dead body of deceased Dhanabhai with her sari, the sari was not seized as muddamal article and therefore, her testimony is unreliable. The learned Counsel for the appellants drew the attention of the court to that part of the deposition wherein Manjulaben stated that near Ramnath Temple, her friend Nirmalaben was residing and in the neighbourhood of Nirmalaben, one Parvatiben who is the sister of appellant no.1 was residing and as appellant no.1 in company of appellant no.2 used to visit the residence of Parvatiben, she knew them, and submitted that identity of the accused is not established by her evidence as neither Nirmalaben nor Parvatiben are examined by the prosecution. It was maintained that she did not raise shouts for help though she was the sister co-religionist of deceased Dhanabhai, and therefore, the possibility that she had come to the scene of offence at belated stage is not ruled out. The learned Counsel for the appellants brought to the notice of the court, the omissions and contradictions appearing in the evidence of eye-witness Manjulaben and argued that her evidence also deserves to be discarded by the court as not trustworthy. While assailing the evidence of Labhuben, it was highlighted that she is doing household work at Vardhmannagar, and she takes about half an hour to reach the place of work from her house and as she had reached the place of work at about 5.0 p.m., she could not have returned back by 5.30 p.m. after attending work at two houses and could not have been present at the time when the incident is alleged to have taken place, which makes her claim that she is an eye-witness to the incident, doubtful. While challenging the evidence of witness Kalyanbhai Becharbhai, the learned Counsel submitted that his presence at the scene of incident is not referred to by any of the witnesses and therefore, his presence at the time when the incident is alleged to have taken place, becomes highly doubtful. It was maintained that he has stated in his evidence that he knows deceased Dhanabhai and witness Manjulaben Bhagwanjibhai since 20

years and if this had been correct, his presence would have been referred to by Manjulaben Bhagwanjibhai, but witness Manjulaben does not refer to the presence of witness Kalyanbhai at the scene of incident and therefore, the evidence of Kalyanbhai should be disbelieved. It was also emphasised that as per the version of Kalyanbhai, he had gone to the house of his daughter to inquire about the health of his son-in-law, at 5.0 p.m. and as house of his daughter is situated on the other bank of river Aji, he could not have been present at 6.0 p.m. at the place of the incident and as his presence is doubtful, his testimony should not be accepted by the court. With reference to evidence of witness Abdul Aziz, it was argued that though this witness claims to be an eye-witness, Manjulaben Bhagwanjibhai has stated that on seeing accused no.2 coming with dharia, witness Abdulbhai had run away, which indicates that Abdulbhai was not an eye-witness. It was asserted that though witness Abdulbhai was a friend of deceased Dhanabhai, he did not try to save his friend, and therefore, his presence at the place of incident becomes doubtful. It was emphasised that police statement of witness Abdul Aziz was recorded after two months and though he was in Rajkot City, he did not go to police for giving statement nor informed anyone that he had witnessed the incident, and having regard to the doubtful conduct of this witness, his evidence should be rejected as not inspiring confidence. After elaborate reference to medical evidence, it was emphasised on behalf of the appellants that injuries no. 1, 2 and 5 sustained by the deceased were contused lacerated wounds which could have been caused only by hard and blunt substance, and as prosecution witnesses have not mentioned that blow or blows was/were given either by accused no.l or accused no.2 with blunt portion of the weapons, their testimony should be discarded as untrustworthy. It was also maintained on behalf of the appellants that as the prosecution witnesses have not referred to any hard and blunt substance having been used by the appellants, origin of the occurrence becomes doubtful, benefit of which must be given to the appellants. In the alternative, the learned Counsel for the appellants submitted that before the incident in question, deceased in company of witness Mavjibhai had been to the house of Laxmanbhai where a quarrel had taken place and thereafter the incident had taken place in which the deceased sustained injuries, and as the fatal blow was given on thigh which is not a vital part of the body, the appellants should be convicted under S.304 part-II of the I.P.Code as the appellants had no intention to cause death of Dhanabhai.

8. Mr.S.R.Divetia, ld.APP submitted that the

eye-witnesses who have deposed before the court are independent witnesses and therefore the learned Sessions Judge did not commit any error in placing reliance on their evidence. It was emphasised on behalf of the State that the presence of all the eye-witnesses is natural and as it is not brought on record of the case that any of the eye-witnesses had any enmity with the appellants, their sworn testimony deserves to be accepted by the court. The learned Counsel for the Respondent stressed that the incident had taken place in day-light and therefore, there is no question of mistaken identity. It was argued on behalf of the respondent that the evidence of eye-witnesses gets ample corroboration from the medical evidence, and therefore, their evidence deserves to be acted upon. It was claimed that witness Mavjibhai had conveyed information to Head Constable Mastram Odhavdas immediately without loss of time wherein names of both the appellants were mentioned and therefore, it cannot be suggested that the appellants are falsely involved in the case after due deliberations by the witnesses. The learned Counsel for the Respondent referred to panchnama of arrest of the appellants, discovery panchnama prepared under S.27 of the Indian Evidence Act, as well as other documents, and pleaded that the testimony of eye-witnesses also gets corroboration from circumstantial evidence led by the prosecution and therefore, the appeal should be rejected. It was contended that soon after the incident, both the appellants had surrendered to police and their clothes were seized which were found to be blood stained and as per the report of the analyst the blood found on the clothes worn by the appellants was of 'A' group which was also the blood group of the deceased and therefore, the appellants have been rightly convicted by the learned Sessions Judge. Mr.S.R.Divetia, ld.APP, referred to the evidence of Investigating Officer and argued that sufficient explanation is given by the Investigating Officer as to why the statement of Abdul Aziz could be recorded on May 4, 1988, and in view of the satisfactory explanation given by the Investigating Officer, sworn testimony of Abdul Aziz should not be rejected on the ground that there is undue delay in recording his police statement. On behalf of the respondent, it was claimed that the case against the appellants is proved beyond reasonable doubt and therefore, the appeal should not be accepted.

9. Before dealing with the submissions.....T....R

bar, it would be advantageous to refer to the principle of appreciation of evidence as laid down by the Supreme Court. While dealing with an acquittal appeal, the

Supreme Court in the case of STATE OF U.P. vs. ANIL SINGH, AIR 1988 SC, 1998, has held as under :

> "13. Of late this Court has been receiving a large number of appeals against acquittals and in the great majority of cases, the prosecution version is rejected either for want of corroboration by independent witnesses, or for some falsehood stated or embroidery added by witnesses. In some cases, the entire prosecution case is doubted for not examining all witnesses to the occurrence. We have recently pointed out the indifferent attitude of the public in the investigation of crimes. The public are generally reluctant to come forward to depose before the court. It is, therefore, not correct to reject the prosecution version only on the ground that all witnesses to the occurrence have not been examined. Nor it is proper to reject the case for want of corroboration by independent witnesses if the case made out is otherwise true and acceptable. With regard to falsehood stated or embellishments added by the prosecution witnesses, it is well to remember that there is a tendency amongst witnesses in our country to back up a good case by false or exaggerated version. The Privy Council had an occasion to observe this. In Bankim Chander v. Matagini, 24 Cal W N 626: (AIR 1919 PC 157), the Privy Council had this to say (at p. 628) of Cal WN) : (at p. 158 of AIR) :
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> > "That in Indian litigation it is not safe to assume that a case must be false if some of the evidence in support of it appears to be doubtful or is clearly untrue, since there is, on some occasions, a tendency amongst litigants to back up a good case by false or exaggerated evidence."
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> 14. In Abdul Gani vs. State of Madhya Pradesh, AIR 1954 SC 31 Mahajan, J. speaking for this court deprecated the tendency of courts to take an easy course of holding the evidence discrepant and discarding the whole case as untrue. The learned Judge said that the Courts should make an effort to disengage the truth from falsehood and to sift the grain from the chaff.
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> 15. It is also our experience that invariably the witnesses add embroidery to prosecution story,

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that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform."

Again in the case of BHARWADA BHOGINBHAI HIRJIBHAI vs. STATE OF GUJARAT, AIR 1983 SC 753, the Supreme Court has observed as under :

".... Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious:

(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object of movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guesswork on the spur of

> the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.
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> (6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on.
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> (7) A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details
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> sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him - perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.
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> Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses, therefore, cannot be annexed with undue importance. More so when the all important "probabilities-factor' echoes in favour of the version narrated by the witnesses. "

10. Witness Manjulaben Bhagwanjibhai has stated in her evidence that she is sister co-religionist of deceased Dhanabhai. She has asserted that at the time when the incident took place, she was going to village from her house. She has deposed before the court that deceased Dhanabhai was standing near Chabutra with his friend Abdulbhai and at that time, the appellants had come there. After identifying the appellants in court, she stated that both the appellants started abusing the deceased and appellant no.1 picked up quarrel with Dhanabhai by saying that he had become a bully as he had quarreled with Laxmanbhai. She has maintained that deceased Dhanabhai did not reply at all. She has asserted that thereafter appellant no.1 took out knife from the waistband of his pants whereas appellant no.2 was armed with dharia, and both the appellants assaulted Dhanabhai indiscriminately. She has also stated that she had raised shouts and at the

place of incident, Labhuben Koli as well as one Rajput and others had collected. Her evidence shows that because of the injuries sustained by Dhanabhai, he had fallen down on ground and thereafter she had covered the body of Dhanabhai with her sari. She has maintained that while running away, accused no.2 had dropped dharia near the house of Labhuben. She also deposed in her evidence that thereafter she had proceeded towards Street No.12, Ramnathpara where Mavjibhai, the uncle of deceased Dhanabhai was residing, to inform him about the incident, but he had met her on way and she had informed Mavjibhai that appellant no.1 had caused injury to deceased Dhanabhai by means of knife whereas appellant no.2 had caused injury to deceased Dhanabhai by means of dharia, and requested him to summon ambulance van. In her sworn testimony she has claimed that the appellants are friends of Laxman Koli, with whom the deceased had a quarrel regarding purchase of eggs and therefore, the appellants had taken side of Laxmanbhai and assaulted deceased Dhanabhai with a view to taking revenge. In her examination-in-chief, she also stated that witness Abdul Aziz was standing with deceased Dhanabhai but had run away because of the assault on the deceased. In cross-examination, she has stated that as she had covered the dead body of Dhanabhai with her sari, she was in blouse and petticoat only and therefore, she had gone to her house for the purpose of wearing sari. She maintained during cross-examination that she had witnessed the incident from a distance of 25 to 30 feet. She also deposed that one way to reach the place where the tea larri of her father is installed is towards Ramnathpara chowk and another is through Canal road, and the place of incident would not come on way to the place where the tea larri is installed, if one selects any of the two ways. However, in answer to the question put by court, she stated that her daily route for going to the place where the tea larri of her father is situated was through Ramnath temple, Ramnathpara chowk, Kotharia naka, gujari bazar, bangle bazar and grain market. In cross-examination, she admitted that the fact that appellant no.2, while running away had dropped dharia near the house of witness Labhuben Koli, was not stated by her in her police statement. She also stated that the fact that the deceased had received injuries on hand, back of neck, thigh, etc. was not mentioned by her in her statement which was recorded by police. She also deposed that she had not stated in her police statement that she knew the accused as accused no.1 in company of accused no.2 was coming to the house of his sister Parvatiben, who was residing near the house of Nirmalaben who was her friend. The submission that witness Manjulaben could not

have been present at the place of incident as the same is not on way to the tea larri of her father has no merit. In answer to the question put by the court, the witness has clearly stated that her daily route for going to the tea larri of her father was through Ramnath temple and Ramnathpara chowk. The fact that she had covered dead body of deceased Dhanabhai with her sari is amply proved by the evidence led by the prosecution. Medical Officer Dr.Kishore Ratilal Raiyani, PW 4, Ex. 14 has stated in his evidence that when he received dead body of Dhanabhai for the purpose of post-mortem, it was covered with a sari. It is so stated by him in paragraph 5 of his deposition. The fact that dead body of deceased Dhanabhai was covered with light yellow coloured sari is also mentioned in column 7 of the post-mortem notes Ex. 15.

Kishorebhai Mohanbhai, PW 8 Ex. 26 is examined by the prosecution for the purpose of proving inquest panchnama. In paragraph 2 of his evidence, this witness has stated that the dead body of deceased was covered with a sari. However he has stated that he did not remember the colour of the sari. In the inquest panchnama Ex. 27 also it is mentioned that the dead body was covered with a sari. It is true that the Investigating Officer did not seize nor produce the sari before the court as one of the muddamal articles. However, that fact by itself, in our view, does not affect credibility of witness Manjulaben. It is relevant to note that though she was subjected to searching cross-examination, nothing has been brought on record to show that she had any enmity with any of the appellants. Her presence at the place of incident is also referred to by other eye-witnesses. The contention that witness Mavjibhai Savabhai, who had given immediate information to Mastram Odhavdas did not refer to the fact that he had derived information about the incident from Manjulaben, and therefore, Manjulaben could not have been witness to the incident, cannot be accepted. Complainant Mavjibhai in his evidence has clearly stated that he derived information about the incident from Manjulaben when he was going towards Chabutra. It is true that in the immediate version Mavjibhai did not mention that he received the information about the incident from Manjulaben. However, it is to be noted that Mavjibhai never claimed that he witnessed the incident. When the first information is given by a person who has not seen the incident but has derived the information from an eye-witness, non-mention of some facts does not assume much importance. In the case of AWADHI YADAV AND ANOTHER vs. THE STATE OF BIHAR, 1971(3) SCC, 116, first information report was given by the person on the basis of information given by an eye-witness. In that report,

there was omission as to fact about accused carrying Bhallas, etc. It was argued that the evidence of the person who gave the F.I.R. should be rejected as there was omission of the fact about accused carrying Bhallas. The Supreme Court has held that "so far as omission in the first information report is concerned, it must be remembered that the information was not given by any one of those who had witnessed the occurrence. It was given by a relative of the deceased on the basis of the information given by PW 6. Hence that omission has no significance ". The F.I.R. is not a substantive piece of evidence and has a limited use. It is also not an encyclopedia of the prosecution case. It is from the nature of the first information report and other surrounding circumstances to be seen whether there was any scope for confusion at the time when the informant gave it or was it a version which merited explanation at the eventual trial. It is not necessary to give minute details in the FIR. FIR is based upon the earliest version of a cognizable offence. The object of the FIR is to obtain early information of alleged criminal activity, to record the circumstances before there is time for them to be forgotten and embellished. As said above, FIR is not a substantive piece of evidence. It can only be used to corroborate the statement of the maker under S.157 of the Evidence Act or to contradict it under S.145 of the Evidence Act. It cannot be used to corroborate or contradict other witnesses. If FIR is not given byany injured person or by any of those who witnessed the occurrence, then no significance can be attached to the fact that the report did not mention the factum of attack or other material point. It is neither customary nor necessary to mention every minute detail in the FIR. The omission of the fact in the FIR that informant had received information from Majulaben would not detract the testimony of Manjulaben which has to be assessed on its own merits. On overall appreciation of evidence of Manjulaben, we are of the opinion that her evidence is truthful and inspires confidence of the court. As there is no enmity with any of the appellants, she would not involve the appellants falsely in such a serious case. She is sister co-religionist of the deceased and would not allow the real culprits to go scot-free. The contradictions and omissions pointed out in her evidence are minor in nature and do not affect her credibility. She has not made material improvements in her deposition before court. On the facts and in the circumstances of the case, we hold that the learned Sessions Judge did not commit any error in placing reliance on her sworn testimony.

11. So far as evidence of Labhuben is concerned, she

has stated in her deposition that she is residing opposite Ramnath temple situated in Ramnathpara area. She has deposed that at the time of incident she was at her house, and was doing household work. She has claimed that she had heard noise of exchange of words coming from Chabutra and had therefore, come out of her house, and had witnessed the incident while standing on otta of her house. She has clearly stated that appellant no.1 took out knife from the waistband of his pants whereas appellant no.2 was armed with dharia, and both the appellants inflicted injuries to Dhanabhai indiscriminately. She has asserted that at that time Manjulaben and one Rajputbhai were present near the place of incident. She has also claimed that Manjulaben had covered the body of Dhanabhai with her sari, and had raised shouts as a result of which people had collected there. She has deposed that thereafter Mavjibhai had come and Dhanabhai was removed to hospital in an ambulance van. In cross-examination, she has stated that she came out of her house because of the shouts raised by Manjulaben. During cross-examination she has also deposed that she is doing household work and attends two houses situated at Vardhmannagar. She has averred that she attends work of cleaning kitchen and utensils in the morning at about 8.0 a.m. and returns back to her house at about 11.30 a.m., whereas in the evening she attends the work at about 5.0 p.m. and returns back at about 5.30 p.m. The reason for returning back to her house by about 5.30 p.m. given by her is that she had young daughter named Reena. She has also stated in her cross-examination that she had not raised any shouts when Dhanabhai was being assaulted. She has also clarified in cross-examination that at the time of incident, she had seen the deceased with Abdul, but Abdul had not intervened in the incident. She has claimed that Abdul had left the place after people had collected there. The submission that at the relevant time she must be attending household work at the houses situated at Vardhmannagar and therefore, could not have remained present at the time when the incident is alleged to have taken place, deserves to be rejected. It is relevant to note that the witness is illiterate. She has clearly stated that she used to come back to her house at about 5.30 p.m. after attending household work at the houses situated at Vardhmannagar. Presence of this witness at the time of incident is also referred to by eye-witness Manjulaben Bhagwanjibhai. Her evidence is corroborated in material particulars by the evidence of eye-witness Manjulaben as well as medical evidence. This witness is neither related to the deceased nor to the complainant. It is not even suggested to the witness that because of some animosity towards the accused, she was deposing

falsely against the accused. Presence of the witness is quite natural because her house is situated just near the Chabutra where the incident took place. There are no major contradictions or omissions in her sworn testimony. It hardly needs to be emphasised that when this witness spoke about the time factor in attending household work at Vardhmannagar, she merely mentioned the time approximately and not the exact time. Even otherwise, when a rustic woman like Labhuben mentions the time of half an hour to reach the houses situated at Vardhmannagar for doing household work, some allowance must be made and the time mentioned should not be treated as precise. On overall view of the evidence of witness Labhuben, we are of the opinion that the learned Sessions Judge has rightly relied on the evidence of this witness.

12. Coming to the evidence of witness Kalyanbhai Becharbhai, we find that in his evidence this witness, has stated that he is residing in a house situated on Ramnathpara main road. On the date of incident, he had gone to the house of his daughter Vaji for making inquiries about the health of his son-in-law, who was not keeping good health. He has stated that he had gone to the house of his daughter at about 5.0 p.m. and had returned at about 6.0 p.m. He has stated that when he was passing by Chabutra situated near Ramnath temple, he had seen deceased in company of Abdulbhai. He has categorically stated that both the appellants were abusing Dhanabhai and appellant no.1 had picked up quarrel with Dhanabhai on the ground that Dhanabhai had become a bully as he had quarrelled with Laxmanbhai. The witness has proceeded to state that appellant no.1 had taken out knife from the waistband of his pants whereas appellant no.2 had a dharia with him, and both the appellants had attacked the deceased indiscriminately and caused injuries to him. The witness has deposed that appellant no.2 while running away had dropped the dharia with him on the ground. This witness also refers to the presence of witness Manjulaben and has stated that she had covered the body of Dhanabhai with her sari.The witness has maintained that after covering the body of Dhanabhai with her sari, Manjulaben had left the place shouting. The witness has further stated that a Koli woman was also present at the place of incident. The cause of incident, as stated by this witness, is that deceased had quarrelled with a Koli. In cross-examination, the witness has clarified that the name of Koli with whom the deceased had quarrelled was Laxmanbhai. He has stated that he was not knowing as to from which ailment his son-in-law was suffering. In paragraph 10 of his deposition, the witness has claimed that he knows Manjulaben since 20 years. The submission

that the evidence of Kalyanbhai should be rejected because his presence at the time of incident is not referred to by any of the eye-witnesses, has no substance. It is relevant to note that the incident had lasted for a short time only. Deceased was attacked in succession. Under the circumstances, attention of other eye-witnesses might not have been drawn towards the presence of this witness. Merely because presence of Kalyanbhai is not referred to by any other eye-witness, it cannot be said that he had not witnessed the incident. It is relevant to note that even as per the Investigating Officer, his police statement was recorded at about 1.30 a.m. on 8.3.1988. This witness is independent and it is not suggested to this witness that he is in any manner related either to the deceased or to the complainant. He has no animosity against any of the appellants and therefore, he has no reason to implicate the appellants falsely. He has clearly stated that he had visited the house of his daughter at about 5.0 p.m., and had left the house at about 6.0 p.m., and while on way to his house, he had witnessed the incident. The evidence of this witness is corroborated not only by the evidence of other eye-witnesses, but also by medical evidence and other circumstantial evidence. The witness has given deposition in most natural manner. No major contradictions have been brought on record, with reference to his deposition so as to discredit him. Under the circumstances, we are of the opinion that the learned Judge cannot be said to have committed any error in placing reliance on the deposition of witness Kalyanbhai.

13. As far as evidence of witness Abdul Aziz is concerned, he has stated in his evidence that he is working at a tea stall which is installed behind S.T.Bus stand, Rajkot. He has deposed that deceased Dhanabhai was his friend, and on the date of incident at about 6.0 p.m. after taking pan, he in company of deceased Dhanabhai was standing near Chabutra. The witness has asserted that both the accused had picked up quarrel with Dhanabhai and had abused the deceased. The witness has stated that appellant no.2 had dharia in his hand whereas appellant no.1 had taken out knife from the waistband of his pants, and both the accused had assaulted the deceased indiscriminately, and caused injuries to him. The witness has candidly admitted that as Dhanabhai was assaulted, he had run away, and gone to Jamnagar because of apprehension that the accused would assault him also. In cross-examination, the witness has stated that after about 4 to 5 days of the incident, he had returned to Rajkot and on learning about death of Dhanjibhai, he had visited the house of deceased 2 to 3 days thereafter. He has stated

that his police statement was recorded within 5 to 6 days of his return to Rajkot from Jamnagar. He has denied the suggestion made on behalf of the accused that he in company of the deceased had gone to the house of accused to assault them. He has also deposed that he does not know either Labhuben or Natubhai Rajput. The submission that the police statement of this witness was recorded after two months and therefore, his evidence should be rejected as unreliable, cannot be accepted. The Investigating Officer, viz. Police Inspector Mr.Chimanlal Trikamlal Sonara has stated in his deposition that police statement of Abdul Aziz was recorded on 4.5.1988. In cross-examination the said witness has deposed that witness Abdul Aziz was not available at Rajkot and therefore, his police statement could not be recorded earlier. In paragraph 7 of his deposition, the witness has denied the suggestion that on the next day after the date of incident, Abdul Aziz had returned to Rajkot. The Investigating Officer has claimed that on 4.5.1988, he had prepared to go to Jamnagar, but he had received the information that witness Abdul Aziz was working at a tea larri near Bus Stand and therefore, he had gone to that place and recorded his police statement. Witness Abdul Aziz has clearly stated that as deceased was assaulted, he was frightened and had, therefore run away. From his deposition read with the deposition of the Investigating Officer, it is apparent that he was under constant fear of being belaboured by the appellants as he was friend of the deceased. Under the circumstances, he left Rajkot City for a pretty long time and therefore, his police statement could not be recorded immediately after the incident. In our view, sufficient explanation has been given by the Investigating Officer as to why the police statement of this witness could not be recorded immediately after the incident. This witness is not found telling falsehood on material aspects of the case. There is no intrinsic defects in his evidence. The comment made against this witness was that he was examined by police two months after the occurrence. This is undoubtedly a matter which is to be taken into consideration. However, the learned Sessions Judge has considered this defect, and has found that the delay in recording the police statement of this witness is sufficiently explained. The say of the witness that his police statement was recorded within 5 to 6 days of his returning to Rajkot is an attempt on his part to add embroidery to prosecution case for the fear of being disbelieved. Defence has failed to point out that any such statement was recorded by Investigating Officer. Recording of police statements of almost all witnesses was over by next day morning. If this witness had been available, there was no reason for the Investigating

Officer for not recording his statement. The defence has failed to bring on record any circumstance indicating that the intervening time was utilised in any manner either by this witness or by the Investigating Officer to fabricate case against any of the appellants. Delay in recording police statement by itself would not be sufficient ground to reject the testimony of this witness more particularly when his presence at the time and place of incident is referred to by all the eye-witnesses. Evidence of witness Abdul Aziz gets ample corroboration not only from the evidence of other eye-witnesses but also from medical evidence on record. The report of Forensic Science Laboratory and panchnama of seizure of clothes of deceased as well as of accused and panchnama of scene of offence also corroborate the evidence of this witness. His assertion that he was standing near chabutra with the deceased after taking pan also gets corroboration from evidence of medical officer Dr. Raiyani who performed post-mortem, as medical officer has stated that in the mouth of dead body, there was pan. It is relevant to note that he is not related in any manner either to the deceased or to the complainant. As he had no enmity whatsoever with any of the appellants, he had no reason to espouse cause of the complainant and he would not involve the appellants falsely merely because the deceased was his friend. Totality of evidence suggests that he is reliable, truthful and dependable witness. The submission that the deposition of Manjulaben to the effect that on seeing accused no.2 coming with dharia, Abdulbhai had run away completely excludes the presence of this witness at the time of actual incident, has no merit as this witness has in no uncertain terms stated that as deceased was assaulted by the appellants, he was frightened and had therefore, run away. This means that this witness had actually seen the assault on deceased. Having regard to the facts of the case, we are of the opinion that the learned Judge has not committed any error in placing reliance on the deposition of witness Abdul Aziz.

14. The evidence of complainant Mavjibhai shows beyond doubt that soon after the incident he had conveyed information about the incident to Head Constable Mastram Odhavdas, who was on duty at the Police Chowky situated in the premises of Civil Hospital, Rajkot. In the said information, names of both the accused are clearly mentioned as the assailants. Before the morning of 8.3.1988, statements of most of the eye-witnesses were recorded by the Investigating Officer. Therefore, this excludes any possibility of the appellants being falsely involved in the case. Ex. 25 which is arrest panchnama of the appellants shows that blood stained clothes worn by

the appellants were seized, whereas the report of F.S.L. indicates that the blood found on the clothes of the appellants was of 'A' group, which was also the blood group of the deceased. This circumstantial evidence also proves involvement of the appellants in the incident.

15. Prosecution has examined Prakashbhai Jivanbhai, PW 10, Ex. 30 to prove discovery of blood-stained knife on the basis of the information given by appellant no.1. This witness has stated that on 8.3.1988 at about 2.0 a.m. he was summoned as a panch witness and in his presence, appellant no.1 had expressed his desire to point out knife which he had concealed in his house. The witness has stated that after preparing the first part of the panchnama he, in company of police personnel had gone to the house shown by appellant no.1, and appellant no.1 in his presence, had taken out a blood-stained knife which was concealed by him in a kuchha bathroom. The witness has proceeded to state that in his presence, the said knife was seized, and he identified the same during his examination-in-chief. Though the witness has been cross-examined at length, nothing has been brought on record to discredit his testimony. The witness is fully corroborated by the discovery panchnama Ex. 31. Evidence of Investigating Officer read with the contents of report of Forensic Science Laboratory makes it abundantly clear that the knife discovered at the instance of appellant no.1 had blood having 'A' group, which was also the blood group of the deceased. Similarly, dharia which was dropped by appellant no.2 near the house of witness Labhuben Koli and which was seized had also human blood-stains, though it could not be ascertained as to which was the group of the blood. However, the fact remains that the dharia was stained with human blood. It is relevant to note that the appellants have not offered any explanation to the circumstantial evidence appearing against them.

15. The contention that the eye-witnesses have not referred to the injuries which could have been caused by means of hard and blunt substance, and therefore, their evidence becomes doubtful, is devoid of merit. In material particulars, the evidence of all the eye-witnesses gets support from the medical evidence. The medical officer in his deposition has stated that injury no.2 was superficial, and could have been sustained by the deceased because of fall. The medical officer has in no uncertain terms deposed that the other injuries are possible by muddamal article no.3 which was dharia and muddamal article no.7 which was knife. It would not be out of place to mention that the deceased had 13 external

injuries which have been elaborately mentioned by the medical officer in his evidence as well as in the post-mortem notes prepared by him. When 13 injuries were caused to the deceased, it would not be possible for any of the witnesses to give precise account of the injuries inflicted by the appellants. Merely because the witnesses have not referred to injuries, which can be caused by hard and blunt substance, that fact by itself would not make their evidence doubtful at all. The Medical Officer has in paragraph 6 of his deposition stated that injury no.1 is possible by means of muddamal dharia. On the facts and in the circumstances of the case, we hold that there are no major discrepancies between the evidence of eye-witnesses and the medical evidence.

16. From the prosecution evidence, it is evident that the common intention of the appellants was to kill deceased Dhanabhai, and with a view to executing that intention, appellant no.1 had armed himself with a knife whereas appellant no.2 had armed himself with a dharia. The prosecution evidence proves beyond reasonable doubt that in furtherance of the common intention, both the appellants had attacked deceased Dhanabhai indiscriminately and caused serious injuries to him. The alternate submission, viz. the case would fall under S.304 Part-II of the I.P.Code has also no merit. The injuries sustained by the deceased have been mentioned in detail in the post-mortem notes prepared by PW 4, Dr.Kishore Ratilal Raiyani. Injury No.12 is described as under :

" (12) I/W right upper thigh 3-1/2" below inguinal ligament midline 1-1/2" x 1" x 1" M.D. Clotted blood + inguinal ligament. "

The corresponding internal injury mentioned in the post-mortem notes shows that there was total cut of common iliac artery on left side at 1" above inguinal ligament 200 cc surrounding blood +. In paragraph 6 of his deposition, the medical officer has stated that external injury no.12 was sufficient in the ordinary course of nature to cause death. His evidence shows that because of external injury no.12, common iliac artery was cut as a result of which excessive bleeding had taken place. In paragraph 9 of his deposition, this witness has not ruled out possibility that the deceased was attacked from front and back. It is not suggested to any of the witnesses that external injury no.12 was unintentional and was caused because of some intervening factors like movement of the deceased, etc. The appellants were armed with

deadly weapons and had attacked the deceased in furtherance of common intention. In view of the medical evidence, it becomes apparent that the case would fall under S.302 of the I.P.Code as the act by which death was caused was done with the intention of causing bodily injury to the deceased, and the medical evidence proves that the bodily injury inflicted was sufficient in the ordinary course of nature to cause death. Under the circumstances, we are of the view that clause thirdly of S.300 of the I.P.Code would squarely apply to the facts of the present case and the case would not fall under S.304 Part-II of the I.P.Code. The contention that external injury no.12 was not caused on the vital part of the body and no intention can be attributed to the accused to cause internal injury which was the result of the said external injury, and therefore, the case would be governed by the provisions of S.304 part-II of the I.P.Code deserves to be rejected. This is not a case of single blow having been inflicted on the deceased. The medical evidence indicates that deceased had sustained multiple injuries all over his body. In fact 11 incised injuries were received by deceased on his body by means of deadly weapons like knife and dharia. This clearly exhibits that the intention of the appellants was to cause his death. As noted earlier, it is nobody's case that injury no. 2 had accidentally landed on that part of the body which is mentioned in the post-mortem notes. It is relevant to note that the blow was given with such a great force that it had pierced through and through not only the thigh, but also the internal vital part of the body. Because of that blow, excessive bleeding had taken place, and as per the evidence of the medical officer, that injury by itself was sufficient in the ordinary course of nature to cause death. In the case of SATISH HABIB JECOB ROMA vs. STATE OF GUJARAT, 20 GLR, 638, after referring to judgments of the Supreme Court, it is held that where a person stabs another in a vital part with a dangerous weapon like knife, the inference is that he intended to cause death or bodily injury as is likely to cause death, and if death ensues as a result thereof, he would be guilty of murder. It is also held by the Division Bench that in any event, his act would betray an intention to cause bodily injury sufficient in the ordinary course of nature to cause death in which event also he would be guilty of murder. The evidence on record clearly proves that the accused came determined to strike, chose the site of injury and thrust the knife deep into the thigh portion of the deceased, which ultimately cut the iliac artery resulting into excessive bleeding. The evidence on record indicates that the nature of injuries sustained by the deceased was so serious that he died instantaneously and Manjulaben had to

cover the dead body with her sari. It is well settled that it is the intention to inflict injury which in the ordinary course of nature, is sufficient to cause death, which will be considered in determining the question whether offence of murder has been made out. If medical evidence shows that a particular injury was sufficient in the ordinary course of nature to cause death, accused would be guilty of murder. On the facts and in the circumstances of the case, we are of the opinion that the case would not fall under S.304 part-II of the I.P.Code, and the appellants are rightly convicted under S.302 of the I.P.Code.

17. Conviction of the appellants under S.135 of the Bombay Police Act is also just and proper. Copy of the notification issued by the Commissioner of Police, Rajkot City under the provisions of the Bombay Police Act, 1951, prohibiting carrying of weapons like knife, sword, etc. which could cause bodily injury, is produced by the prosecution at Ex.22. That notification was in force from 1.3.1988 to 30.3.1988. The evidence of prosecution witnesses proves that appellant no.1 was in possession of knife whereas appellant no.2 was in possession of dharia on 7.3.1988, and they caused injuries to the deceased. Under the circumstances, the offence as defined in S.135 of the Bombay Police Act, 1951 is clearly made out against the appellants. We, therefore, hold that the learned Judge has not committed any error in convicting the appellants under S.135 of the Bombay Police Act.

18. For the foregoing reasons, we do not see any merit in the appeal and the appeal is therefore, liable to be dismissed. The appeal therefore, fails and is dismissed.

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abraham*